IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 206 OF 2005

IN

STAMP NUMBER MAIN NO. 2351 OF 2005

DR. HEMANT D. DALVI, PONDA GOA ....Applicant

Versus

DEEPAK H. SHETH AND 2 ORS., ...Respondents

Shri V.P. Thali,Advocate for the Applicant.

Mr. Cleofato Almeida Coutinho Advocate for the respondents.

Coram:- N. A. BRITTO, J.

Date:- 19th January, 2006

P.C.

Heard Shri Thali, the learned Counsel on behalf of the applicant who is the original complainant in Criminal Case No. 114/NIA/97/A and Shri C. A. Coutinho, the learned Counsel on behalf of the respondents/accused in the said case.

2. The said complainant has sought Special Leave to Appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, by Judgment/Order of the learned Additional Assistant Sessions Judge, Panaji, dated 26.07.2005.

3. Briefly stated, the complainant, the accused Deepak H. Sheth and one Ram Mohan Menon, were the Directors of M/s. VIBGYOR Coatings Private Limited. On account of certain disputes, the complainant resigned from the said Company as a Director and sold the shares of his wife to the

said accused namely shares nos. 15181 to 16180 covered by Certificate no. 19 and shares nos. 16181 to 17180 covered by Certificate no. 20 and regarding which, there is no dispute. The said accused in or about 28.04.1997, also agreed to purchase from the complainant 1360 shares at the rate of Rs.100/- each and, as the said accused had no money, the said accused issued to the complainant a post dated cheque in the sum of Rs.1,36,000/- dated 27.07.1997, drawn on Goa Urban Co-operative Bank Limited, Margao. The complainant presented the said cheque to his Bank but the same was dishonoured on account of stop payment instructions issued by the said accused and after the service of statutory notice, the complainant prosecuted the said accused along with Sheth Publishers Pvt. Ltd., the accused no.2, under Section 138 of the said Act.

4. The complainant examined himself and produced the relevant documents. In support of his case, the accused also examined himself and not only that, examined the Chartered Accountant/Auditor of the said Company namely D.w.2, Naguesh Hegde, as well as the other Director namely D.w.3, Ram Mohan Menon. The learned J.M.F.C., by his Judgment dated 18.12.2003, convicted and sentenced the accused under Section 138 of the Act but both the accused having filed an appeal to the Sessions Court, the learned Additional Sessions Judge, by his Judgment/Order dated 26.07.2005, acquitted both the accused and, as far as the accused Deepak H Sheth is concerned, holding that there was no legal liability subsisting against the said accused.

5. The evidence produced in the course of the trial showed that the said Share Certificates nos. 21 and 22 having shares nos. 17181 to 18180 and 18181 to 18540, were not handed over by the Complainant to the said accused nor the necessary form namely Form 7(b) as required under Section 108 of the Companies Act, 1956, was handed over by the complainant to the accused to be lodged with the Company or with the Registrar of Companies. Although the complainant stated in his evidence that when the said accused had purchased the shares from him, he had given the said share transfer form to the accused directly, the Complainant

stood falsified by D.w.2, who had stated that the complainant had given the said form to him to be handed over to the said accused but had taken it back from him. The evidence of the accused showed that the accused had agreed to purchase the said shares from the complainant and for that reason, and as the accused had no money with him, had issued the said post dated cheque for the purchase of the said shares. The evidence of D.w.3, Ram Mohan Menon, showed that although the complainanat resigned from the said Company, till date, the complainant continues to be the holder of the said shares which were agreed to be sold to the said accused. Reliance has been placed on behalf of the complainant on Para 84 of LIC vs. Escorts Limited & Ors. ((1986) 1 S.C.C. 264), to show that transfer of shares is complete only when the transfer is registered in the Company's register. There can be no dispute about that proposition. However, the facts stated on behalf of the accused and those proved by the accused through the evidence of his witnesses show, that the Complainant had not at all given to the accused the said certificates duly signed by him or for that matter form 7(b) duly completed by the Complainant to enable the accused to lodge the same with the company for the transfer of the shares agreed to be sold and regarding which the complainant has given a post dated cheque. As per the accused, the formalities of the transfer were to be completed by the end of June, which indeed were not completed and, on the contrary, the evidence showed that the Complainant who had taken the first step by handing over the said form no. 7(b) to D.w.2, with a view to complete the formalities of transfer, retracted the same by taking it away from D.w.2, thereby showing his intention that he was not willing to complete the said formalities for transfer of the said shares agreed to be purchased by the said accused from the complainant and, towards which, the accused had issued the said post dated cheque and, in such a situation, the action on the part of the accused to give instructions to stop payment of the amount due on the said cheque, could not be faulted. Since the complainant had taken no adequate steps towards the transfer of the said shares either by handing over the share Certificate or for that matter the said share transfer form in form no. 7(b), till the end of June as agreed between the parties, the

accused had no other option but to instruct the bank to stop the payment of the cheque. Although the notice sent by the Complainant is presumed to have been served on the accused, the accused had no liability to comply with it because the Complainant had not transferred the said shares to the accused nor taken any steps in that direction. The action on the part of the accused of either giving the said instructions to the bank or for not complying with the statutory notice could not be faulted. In other words, the conclusion arrived at by the learned Additional Sessions Judge, that the accused had no existing liability towards the complainant to honour the said cheque, could not be faulted.

6. In view of the above, this is not a fit case to grant Special Leave to Appeal. Considering the facts that the complainant inspite of not taking steps to transfer either the share Certificates, chose to prosecute the accused first under Section 138 of the said Act and now seeks leave to appeal against the acquittal of the accused, this is a fit case to impose cost of Rs.5,000/- against the complainant to be paid to the said accused.

7. For reasons stated herein above, the application for grant of Special Leave is hereby rejected.

N. A. BRITTO, J.

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